

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM 1936

No. [REDACTED]

76

UNITED STATES, PETITIONER

STEPHEN ROBERT DEMKO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

WRITING FOR CERTIORARI GRANTED BY THE
COURT GRANTED APRIL 4, 1937

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1039

UNITED STATES, PETITIONER

vs.

STEPHEN ROBERT DEMKO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

INDEX

Original Print

Proceedings in the United States Court of Appeals
for the Third Circuit

Appendix for the United States consisting of por-
tions of the record from the United States Dis-
trict Court for the Western District of Pennsyl-
vania

Relevant docket entries	1	2
Complaint	3	3
Motion for summary judgment	7	6
Certificate of Edward L. Barteet	8	7
Affidavit of Edward L. Barteet	9	7

Appendix for the United States consisting of portions of the record from the United States District Court for the Western District of Pennsylvania—Continued

Memorandum order, November 27, 1963	10	8
Order, December 4, 1963	12	10
Stipulation and order thereon, July 13, 1964	13	11
Federal Prison Industries Compensation Regulations	16	13
Supplemental Appendix for the United States consisting of portion of the record from the United States District Court for the Western District of Pennsylvania	22	20
Opinion, Palmieri, J., in the case of Granade v. United States, No. 30740 in the United States District Court for the Southern District of New York	23	21
Stipulation for extension of time in which to file appellant's brief and order thereon	26	23
Stipulation for extension of time in which to file appellee's brief and order thereon	27	24
Opinion, Freedman, J.	28	25
Order amending opinion	36	32
Judgment	37	33
Clerk's certificate (omitted in printing)	38	34
Order extending time to file petition for writ of certiorari	39	35
Order allowing certiorari	40	36

[fol. A]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 15,087

[File Endorsement Omitted]

STEPHEN ROBERT DEMKO

v.

UNITED STATES OF AMERICA, APPELLANT

**ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA**

**APPENDIX FOR THE UNITED STATES—Filed
December 8, 1964**

• • • • •

7

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 63-803 Civil Action

STEPHEN ROBERT DEMKO

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

<u>DOC. NO.</u>	<u>DATE</u>	<u>DOCKET ENTRIES</u>
	1963	
1	Sept. 18	Complaint filed.
3	Nov. 18	Motion for Summary Judgment filed by deft.
6	Dec. 4	Hearing on Motion for Summary Judgment begun and concluded C.A.V. before Gourley, J. Hearing memo filed. (Rep: J. Lilienthal) (Oral opinion on record)
7	Dec. 4	Order entered directing that motion entitled "Notice of Motion for Summary Judgment" was considered as a motion to dismiss and same is hereby denied. (Gourley, J.)
	1964	
19	July 13	Stipulation filed and Order entered directing that Judgment be and hereby is entered in favor of pltf. Stephen Robert Demko and against the deft. the United States of America in the amount of \$20,000.00. (Gourley, J.)

[fol. 2]

20

1964

July 14

Pursuant to Order entered,
Judgment on Decision by the
Court filed by the Clerk and
Judgment is hereby entered
accordingly.

James H. Wallace, Jr., Clerk

21

July 14

Sept. 3

Notice mailed.

Notice of appeal filed by U.S.
Attorney.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 63-803

[Title Omitted]

COMPLAINT—Filed September 18, 1963

Stephen Robert Demko brings this action against the United States of America upon a cause of action whereof the following is a statement:

FIRST: The plaintiff, Stephen Robert Demko, resides at 3458 Beechwood Boulevard, Pittsburgh, Allegheny County, Pennsylvania.

SECOND: On or about March 12, 1962, plaintiff, Stephen Robert Demko, was an inmate of the Lewisburg Penitentiary, Lewisburg, Pennsylvania, pursuant to sentence imposed by the Honorable Rabe Marsh of this Court under the provisions of 18 USCA 4208 (b) for interstate transportation of fraudulent checks.

THIRD: While confined under said sentence, plaintiff, on said date at about 10:00 A.M. thereof, was ordered and directed to replace blown out windows in the Lewisburg Penitentiary power plant. At the direction of the construction supervisor, plaintiff was required to climb

up cat-like on the beams of the wall and precariously balance himself on an angle-iron cross bar placed upon two steel beams, placing one hand against the wall and [fol. 4] with the other hand manipulate a 40x60 inch plate of glass into a rubber gasket through the use of a screw driver.

FOURTH: While plaintiff attempted to balance himself in this position and insert the window into the gasket, the glass broke, catapulting plaintiff to the outside and causing him to fall a distance of thirty-seven (37) feet.

FIFTH: The accident was the proximate result of the negligence and gross negligence of the defendant and its employees or servants acting within the scope of their authority in the following particulars:

(a) In failing to provide step-ladders and scaffolding essential for the safety of the plaintiff in performing the assignment required of him.

(b) In exposing plaintiff to extreme danger in violation of the duty which the United States of America owes to the care and protection of prisoners confined to its penal institutions.

SIXTH: As a result of the aforesaid negligence and gross negligence of the defendant and its employees or servants, the plaintiff, Stephen Robert Demko, has suffered severe and permanent injuries:

He suffered comminuted fractures of the ankle and tibia of the right foot.

He suffered paralysis of the right foot.

[fol. 5] He suffered injuries and damage to the muscles, ligaments, bones, joints, tissues, nerves and intervertebral discs of the back and spine.

He sustained a concussion of the brain, and that by reason of said injuries he sustained a laceration, rupture, and dissociation of the brain cells, brain matter, coverings of the brain and other parts of the head and brain structure and a severe hemorrhage within the brain as to bring about a severe concussion and destruction of the brain, and that by reason of said injuries, his brain function and capacity has been greatly diminished, weak-

ened, and impaired; that by reason of said injuries he suffers terrific pains in the head, headaches, unusual and extraordinary fullness and pressure within the head, temporary blackouts, dizziness, lack of concentration, co-ordination and equilibrium.

He sustained a severe shock to his general and central nervous system by reason of all of said injuries, and his general health has become greatly weakened and impaired by reason of said injuries. He suffers severe spells of dizziness, headaches, melancholy and insomina by reason of said injuries; he has been sick, sore and disabled ever since sustaining said injuries, and will continue to be sick, sore and disabled by reason of said injuries for the rest of his life. He will suffer a total and permanent impairment of his earning power.

[fol. 6] SEVENTH: This action is brought in accordance and conformity with the provisions of the Act of Congress dated June 25, 1948, 62 Stat. 992, 28 U.S.C.A. Sections 1346 (b), 1402, 2401 (b), 2402, 2511, 2512 (b), 2671-2680 (1950) otherwise known as Federal Tort Claims Act.

WHEREFORE, plaintiff demands of defendant, the United States of America, damages in excess of the jurisdiction of the United States Court.

Hence this suit.

/s/ GERALD N. ZISKIND
Attorney for Plaintiff

[fol. 7]

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**MOTION FOR SUMMARY JUDGMENT—Filed
November 18, 1963**

Defendant, United States of America, pursuant to Rule 56 of the Federal Rules of Civil Procedure, respectfully moves for summary judgment in the above-entitled action on the ground that the Court is without jurisdiction in that the plaintiff's exclusive remedy is the compensation available under Title 18, United States Code, Section 4126. Plaintiff has made claim for and received compensation benefits under said Compensation law.

In support of this motion, defendant attaches hereto and makes a part hereof, the affidavit of Edward L. Barteet, and a certified copy of the award of compensation to the plaintiff pursuant to 18 U.S.C. 4126.

GUSTAVE DIAMOND
United States Attorney

STANLEY W. GREENFIELD
Assistant U. S. Attorney
633 New Federal Building
Pittsburgh 19, Pennsylvania

**Attorneys for Defendant,
United States of America**

Of Counsel:

J. CHARLES KRUSE
Attorney
Department of Justice
Washington, D.C.

[fol. 8] CERTIFICATE ATTACHED TO MOTION FOR
SUMMARY JUDGMENT

District)
 of) ss:
Columbia)

I, Edward L. Barteet, certify that I am the Administrative Officer of Federal Prison Industries, Inc., and in that capacity I am custodian of the original Awards of Accident Compensation made pursuant to the provisions of Section 4126, Title 18, United States Code.

I further certify that the attached document is a true and accurate copy of an official document, the recommendation and approval of an award in the sum of \$180.00 per month to Stephen Robert Demko for an injury to his ankle.

In Witness Whereof, I have hereunto set my hand this 14 day of November, 1963.

/s/

EDWARD L. BARTEET
Administrative Officer
Federal Prison Industries, Inc.

[fol. 9] AFFIDAVIT ATTACHED TO MOTION FOR
SUMMARY JUDGMENT

District)
 of) ss:
Columbia)

I, Edward L. Barteet, am Administrative Officer of Federal Prison Industries, Inc., and as such, I am in charge of the Accounting Officer for that government corporation.

Our records indicate that Stephen Robert Demko is currently being paid the sum of \$180.00 per month pur-

suant to the provisions of section 4126, Title 18, United States Code.

/s/

EDWARD L. BARTEET
Administrative Officer
Federal Prison Industries, Inc.

[attestation omitted]

[fol. 10]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM ORDER—November 27, 1963

This is an action under the Federal Tort Claims Act in which it is alleged that plaintiff on March 12, 1962 was injured due to the negligence of the Superintendent and his associate supervising employees at the Lewisburg Penitentiary in directing the plaintiff inmate to perform certain services at the institution which placed him in a precarious situation and resulted in his falling, and serious injuries were sustained.

The immediate matter before the court is a motion for summary judgment on the part of the United States of America.

It is contended that under the provisions of section 4126, Title 18, United States Code, the sole remedy of an inmate of a penal institution is controlled by the compensation provisions of said Act provided, however, compensation paid shall not be greater than that provided in the Federal Employees' Compensation Act.

Unquestionably, before the case of United States v. Muniz, 372 U.S. 150, the law was in somewhat of a state of confusion since the decisions of the circuits were at variance. This case specifically determines that a federal prisoner can sue under the Federal Tort Claims Act to

recover damages from the United States for personal injuries sustained during confinement in a federal penitentiary and resulting from negligence of a government employee.

However, it is true that in the Supreme Court decision [fol. 11] the plaintiffs were not performing employment at the institution where they were confined.

It, therefore, appears that most extensive briefs should be presented to the Court as to whether the decision of the Supreme Court does or does not have application to the facts which exist in this proceeding. Said briefs are to be filed with this member of the Court on or before December 3, 1963, and the matter is fixed for argument before this member of the court on Wednesday, December 4, 1963, at 10:00 A.M.

If counsel for the parties fail or neglect to comply with the terms and provisions of this Order as to the filing of briefs and appearing for argument, appropriate sanctions will be imposed on offending counsel.

Dated: November 27, 1963

/s/ WALLACE S. GOURLEY, CDJ
Chief Judge

cc: Gerald Ziskind, Esq.
2602 Grant Bldg.
United States Attorney

[fol. 12]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ORDER—December 4, 1963

In this proceeding the immediate matter before the Court is entitled "Notice of Motion for Summary Judgment" but since an answer has not been filed to the complaint, it in reality is a motion to dismiss the complaint and the Court will consider the motion in said category.

After a full and complete hearing, consideration of the briefs of counsel, and most extended argument, the Court is of the considered judgment that the motion to dismiss should be denied.

NOW, THEREFORE, this 4th day of December, 1963, the motion entitled "Notice of Motion for Summary Judgment" is considered as a motion to dismiss the complaint and it is hereby denied.

/s/ WALLACE S. GOURLEY, CDJ
Chief Judge

cc: Gerald N. Ziskind, Esq.
2602 Grant Building
Gustave Diamond, Esq.
United States Attorney

[fol. 13]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

STIPULATION AND ORDER—Filed July 13, 1964

It is stipulated between the parties that:

I.

This is an action for money damages for personal injury, brought pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 et seq.

II.

Defendant admits that the negligence of the employees of the United States was the proximate cause of the plaintiff's injuries which are the subject of this suit.

III.

The amount of \$20,000.00 in addition to the compensation received and compensation to be paid, would adequately compensate the plaintiff for the injury sustained.

IV.

Defendant's defense that plaintiff's right to compensation pursuant to 18 U.S.C. 4126 is an exclusive remedy which bars suit under the Federal Tort Claims Act was asserted by way of Motion for Summary Judgment. Both parties filed briefs and presented oral argument on the Motion for Summary Judgment. On December 4, 1963 the Court entered an order denying the Motion.

V.

Based upon the Court's determination that the plaintiff's right to compensation does not bar suit under the Federal Tort Claims Act, the parties agree that the plaintiff is entitled to a judgment in the amount of \$20,000.00.

[fol. 14]

VI.

Upon the entry of final judgment defendant reserves the right to further litigate the question of whether the plaintiff's right to compensation pursuant to 18 U.S.C. 4126 bars suit under the Federal Tort Claims Act, the issue resolved adversely to the United States in the Court's interlocutory order of December 4, 1963.

VII.

The plaintiff's right to compensation pursuant to 18 U.S.C. 4126 is not affected by this suit. Regardless of the outcome of this suit the plaintiff will have the same right to compensation as if suit had not been instituted.

STIPULATED AND AGREED

GERALD ZISKIND

Attorney for Plaintiff

GUSTAVE DIAMOND

United States Attorney

STANLEY W. GREENFIELDAssistant U. S. Attorney
Attorneys for Defendant

OF COUNSEL:

J. CHARLES KRUSE, Attorney
U. S. Department of Justice

[fol. 15]

ORDER—July 13, 1964

And now, this 13 day of July, 1964, based upon Stipulation of the parties as hereto attached and made a part hereof, it is ordered and decreed that judgment will be and hereby is entered in favor of Stephen Robert Demko, plaintiff, and against the United States of America, defendant, in the amount of \$20,000.00.

/s/ WALLACE S. GOURLEY
Chief Judge

[fol. 16]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL PRISON INDUSTRIES, INC.
WASHINGTON, D.C.

INMATE ACCIDENT COMPENSATION
REGULATIONS

1. To carry out the intent of Congress in authorizing the payment of accident compensation to inmates or their dependents for injuries sustained while employed by Federal Prison Industries, Inc., or in any work activity in connection with the maintenance or operation of the institution where confined, and pursuant to Section 4126 of Title 18, United States Code, and authority delegated by the Attorney General and the Board of Directors of Federal Prison Industries, Inc., the following regulations are prescribed to insure complete reports covering all injuries and full information to permit prompt action on claims submitted.

ACTION TO BE TAKEN AND REPORTS TO BE
SUBMITTED ON ALL INJURIES
MEDICAL ATTENTION

2. Whenever an inmate worker is injured while in the performance of assigned duty, regardless of how trivial

the hurt may appear, he shall report the injury to his official superior who will take whatever action is necessary to secure for the injured such first aid, medical or hospital treatment as may be necessary for the proper treatment of the injury. Medical, surgical and hospital service will be furnished by the medical officers of the institution. Refusal by an inmate worker to accept such medical, surgical, hospital or first aid treatment may cause forfeiture of any claim for accident compensation for disability resulting therefrom.

RECORD OF INJURY AND INITIAL CLAIM

3. After initiating necessary action for medical attention the work detail supervisor shall immediately secure a record of the cause, nature and extent of the injury, and shall see that the injured inmate submits within 48 hours FPI Form 45, entitled "Inmate Worker's Notice of Injury and Original Claim for Compensation and Medical Treatment." The names and testimony of all witnesses shall be secured and, if the injury resulted from the [fol. 17] operation of mechanical equipment, an identifying description of the machine or instrument causing the injury shall be given.

REPORT OF INJURY

4. All injuries resulting in disability of the injured for work beyond the day, shift, or turn in which it occurs shall be reported by the inmate's work detail supervisor on Administrative Form 19, in accordance with instruction sheet, Administrative Form 19a. After review by the institution safety inspector, or his appointed equivalent, for completeness, the report shall be delivered to the Warden or Superintendent of the institution; and then forwarded promptly to the Safety Administrator in the Washington office, accompanied by FPI Form 45 executed by the injured inmate worker. All questions shall be answered in complete detail. The physician's statement must be secured on Administrative Form 19 whenever the injury is such as to require the attention of a physician.

In the case of an injury to an inmate sustained while employed in any work activity in connection with the maintenance or operation of the institution where confined, the reports and treatment of such injured inmate shall be made under the regulations in effect at the time of such injury and the reports as to treatment and the cause, nature and extent of the injury shall be made to comply as nearly as possible with the requirements of paragraphs 2, 3, and 4 of these regulations.

PRE-RELEASE CLAIM FOR COMPENSATION

5. As soon as release date is determined, but not in advance of thirty days prior to release date, each inmate injured in industries or on an institutional work assignment during his confinement shall be given FPI Form 43 Revised and advised of his rights to make out his claim for compensation. Every assistance shall be given him to properly prepare the claim. In each case a physical examination shall be given and a definite statement made as to the effect of the alleged injury on the inmate's earning capacity after release. Failure to submit to a final physical examination before release shall result in the forfeiture of all rights to compensation or future medical treatment. In each case of visible impairment, disfigurement, or loss of member, photographs shall be taken to show actual condition and shall be transmitted with FPI Form 43.

6. The claim, after preparation and execution by the inmate, shall be completed by the physician making the [fol. 18] final examination and by the parole or social service officer and forwarded promptly to the Safety Administrator in the Washington office accompanied by, or reference made to, Form 19, Report of Institutional Injury and FPI Form 45, Inmate Worker's Notice of Injury and Original Claim.

REPORT OF RECURRENCE OF DISABILITY

7. When an inmate worker has been injured and has later returned to work and then subsequently there is a recurrence of disability from said injury, a complete re-

port shall be made with appropriate reference to previous reports covering the initial injury.

REPORT OF DEATH

8. If an injury results in death before the report of injury on Administrative Form 19 has been forwarded to the Safety Administrator, the death shall be reported on FPI Form 43, which shall accompany the Report of Injury. If death results after the Report of Injury has been forwarded a report of the death on FPI Form 43 shall be sent at once to the Safety Administrator.

REPORT OF ACCIDENT PRONENESS

9. If an inmate worker is injured more than once in a comparatively short time and the circumstances of the injury indicate an awkwardness or ineptitude that in the opinion of his work supervisor implies a danger of further accidents in the tasks assigned, the inmate shall be relieved of the performance of the task, and assigned another task if permissible or a report of the circumstances shall be made to the Institution Safety Inspector and the Classification Committee with a request that the inmate be transferred to another assignment.

COMPENSATION FOR INJURIES

NON-COMPENSABLE INJURIES

10. Injuries sustained by inmate workers willfully or with intent to injure someone else, or injuries suffered in any activity not directly related to their work assignment are not compensable, and no claim for compensation for such injuries will be considered. Disregard of safety rules and instructions, failure to use available safety clothing and equipment, or an act to make safety equipment inoperative shall result in a transfer to another assignment. Any injury resulting from willful violation of rules and regulations may prevent award of compensation.

[fol. 19] COMPENSATION FOR LOST TIME

11. No accident compensation will be paid for compensable injuries while the injured inmate remains in the institution. However, inmates assigned to Industries will be paid for the number of regular work hours in excess of three consecutive inmate man-days they are absent from work because of injuries suffered while in performance of their work assignments. The rate of pay shall be the standard hourly rate for the grade, including longevity if applicable, regardless of the pay plan, but shall exclude any overtime or production bonus. No claim for compensation will be considered if full recovery occurs while the injured is in custody and no significant disability remains after release.

COMPENSATION AWARDS

12. The amount of accident compensation as authorized under Section 1 shall be determined as the time of release regardless of when during the periods of incarceration of the applicant the injury was sustained or of any payment made in lieu of regular earnings or any medical or surgical services furnished prior to such release.

ESTABLISHING THE AMOUNT OF THE AWARD

13. In determining the amount of accident compensation to be paid consideration will be given to the permanency and severity of the injury and its resulting effect on the earning capacity of the inmate in connection with employment, after release. The provisions of the Federal Employee's Compensation Act shall be followed when applicable. The minimum wage prescribed by the Fair Labor Standards Act applicable at the time of release shall be used as the wage basis in determining the amount of such compensation. In no event shall compensation be paid in greater amount than that provided in the Federal Employee's Compensation Act. (Title 18, United States Code 4126).

TIME AND METHOD OF PAYMENT OF COMPENSATION CLAIM

14. Upon determination of the amount of compensation to be paid a copy of the award will be furnished the

claimant and monthly payments will begin about the tenth day of the first month following the month in which the award is effective. The first payment is usually within 45 days of release from institution. Payments shall be made through the office of the United States Probation Officer of the district in which the claimant resides. Lump sum payments will be made only in exceptional cases where it is clearly shown to be beneficial and necessary for the support of the claimant or dependents.

[fol. 20] 15. When requested by the claimant and approved by the Corporation, accident compensation may be paid direct to dependents of the claimant. In all cases claimant must indicate in detail those persons who are dependent on him, their relationship and all facts as to residence, other income, etc., so that the Corporation will be able to determine to what extent they are dependent on the claimant.

COMPENSATION SUSPENDED BY MISCONDUCT

16. Awarded compensation shall be paid only so long as the claimant conducts himself or herself in a lawful manner and shall be immediately suspended upon conviction of any crime, or upon incarceration in any jail, correctional, or penal institution. However, the Corporation may pay such compensation or any part of it to the inmate or any dependents of such inmate where and as long as it is deemed to be in the public interest.

MEDICAL TREATMENT REQUIRED FOLLOWING DISCHARGE

17. If medical or hospital treatment is required subsequent to discharge from the institution, for an injury sustained while employed by Federal Prison Industries, Inc., or on an institutional work assignment, claimant should advise the Commissioner of Industries and if the cost of such treatment is allowed by the Corporation advice to this effect and instructions for obtaining such service will be forwarded. The Corporation will under no circumstances pay the cost of medical, hospital treatment or any related expense not previously authorized by it.

CIVILIAN COMPENSATION LAWS DISTINGUISHED

18. Compensation awarded hereunder differs from awards made under civilian workmen's compensation laws in that hospitalization is usually completed prior to the inmate's release from the institution and, except for a three day waiting period, the inmate received pay while absent from work. Other factors necessarily must be considered that do not enter into the administration of civilian workmen's compensation laws.

EMPLOYMENT OF ATTORNEYS

19. It is not necessary that claimants employ attorneys or others to effect collection of their claims, and under no circumstances will the assignment of any claim be recognized.

[fol. 21] *These regulations shall be effective as of September 26, 1961.*

Approved this 1st day of *February*, 1962.

JAMES V. BENNETT
Commissioner
Federal Prison Industries, Inc.

[fol. 22]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15087

[File Endorsement Omitted]

STEPHEN ROBERT DEMKO

v.

UNITED STATES OF AMERICA, APPELLANT

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

SUPPLEMENTAL APPENDIX FOR THE
UNITED STATES—Filed February 11, 1965

• • • •

[fol. 23]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CIV MO 310 OPIN 273

30740

U.S. District Court
Filed
Jan 6 1965
4:15 pm
S.D. of N.Y.

64 Civil 1447

LOUIS H. GRANADE, PLAINTIFF

against

UNITED STATES OF AMERICA, DEFENDANT

OPINION—January 6, 1965.

PALMIERI, J.

This is a motion by the Government for summary judgment pursuant to Fed. R. Civ. P. 56 for failure to state a claim upon which relief may be granted.

On September 13, 1962, the plaintiff was a prisoner at the Federal House of Dention in New York City. On that day, he was injured while engaged in the performance of duties assigned to him. He instituted this action pursuant to 28 U.S.C. §§ 1346(b), 2671 *et seq.*, the Federal Tort Claims Act.

It is undisputed that the plaintiff's injury is compensable under 18 U.S.C. § 4126, which provides in part:

[fol. 24] The corporation [Federal Prison Industries, Inc.] . . . is authorized to employ the fund, and any earnings that may accrue to the corporation, as operating capital in performing the duties imposed by this chapter; . . . in paying, under rules and regulations promulgated by the Attorney General, . . . [the] *compensation to inmates or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or opera-*

tion of the institution where confined. In no event shall compensation be paid in a greater amount than that provided in the Federal Employees' Compensation Act. (Emphasis added.)

The only question is whether this section provides the plaintiff's sole remedy. If it does, the plaintiff cannot maintain his suit under the Federal Tort Claims Act and summary judgment should be granted.

The entire statutory scheme of remedies against the Government is based on the principle that where there is a remedy available in the form of a compensation system, there is no concurrent right to sue under the Federal Tort Claims Act. *E.g.*, *Patterson v. United States*, 359 U.S. 495, 496 (1959); *Johansen v. United States*, 343 U.S. 427, 439 (1951); *Feres v. United States*, 340 U.S. 135 (1950); *Balancio v. United States*, 267, F.2d 135 (2d [fol. 25] Cir. 1959); *Aubrey v. United States*, 254 F.2d 768 (D.C. Cir 1958); *Nobles v. Federal Prison Industries*, 213 F. Supp. 731 (N.D. Ga. 1963).

The plaintiff relies on *United States v. Muniz*, 374 U.S. 150 (1963), for the proposition that he may maintain this action. That case, however, does not support him. The sole issue presented by that case was whether an inmate in a federal penitentiary could maintain a suit against the United States for negligent injury under the Federal Tort Claims Act. The Supreme Court held such a suit was permissible. No compensation act was involved nor was there any question with respect to the exclusiveness of remedies.

It follows from what has been said that the plaintiff may not maintain this action.

The defendant's motion for summary judgment is granted.

SUBMIT ORDER ON NOTICE.

Dated: New York, N.Y.
January 6, 1965

/s/ EDMUND L. PALMIERI
EDMUND L. PALMIERI
U. S. D. J.

[fol. 26]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,087

[File Endorsement Omitted]

[Title Omitted]

STIPULATION FOR EXTENSION OF TIME IN WHICH TO
FILE APPELLANT'S BRIEF—Filed October 28, 1964

The record on appeal having been docketed in the Court of Appeals on October 8, 1964, under the Rules of the Court appellant's brief is presently due to be filed on November 7, 1964. It is hereby

STIPULATED and AGREED by counsel for appellant and appellee that the time in which to file appellant's brief may be extended to and including Monday, December 7, 1964.

/s/ Morton Hollander

/s/ Richard S. Salzman
Attorneys,
Department of Justice,
Washington, D.C. 20530.
Counsel for Appellant.

/s/ Gerald N. Ziskind
2602 Grant Building
Pittsburgh, Pennsylvania
Counsel for Appellee.

SO ORDERED:

Dated: Oct 28, 1964.

/s/ William H. Hastie
Circuit Judge

[fol. 27]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,087

[File Endorsement Omitted]

[Title Omitted]

STIPULATION FOR EXTENSION OF TIME IN WHICH TO
FILE APPELLEE'S BRIEF—Filed December 28, 1964

The record on appeal having been docketed in the Court of Appeals on October 8, 1964, and Appellant, by Stipulation and Order of this Court, having filed its Brief prior to the date of Stipulation of December 7, 1964, it is hereby

STIPULATED and AGREED by counsel for Appellant and Appellee that the time in which to file Appellee's Brief may be extended to and including Monday, February 8, 1965.

MORTON HOLLANDER

RICHARD S. SALZMAN
Attorneys,
Department of Justice,
Washington, D.C. 20530
Counsel for Appellant.

GERALD N. ZISKIND
2602 Grant Building
Pittsburgh, Pennsylvania
Counsel for Appellee.

SO ORDERED:

Dated:  Dec. 28, 1964.

WILLIAM H. HASTIE
Circuit Judge

[fol. 28]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15087

[File Endorsement Omitted]

STEPHEN ROBERT DEMKO

v.

UNITED STATES OF AMERICA, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 9, 1965

Before GANEY and FREEDMAN, *Circuit Judges*, and KIRKPATRICK, *District Judge*

OPINION OF THE COURT—Filed September 21, 1965

By FREEDMAN, *Circuit Judge*.

Plaintiff brought this suit under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.*, for damages for personal injuries sustained on March 12, 1962 while performing maintenance work which he was ordered to do as an inmate of the Federal Penitentiary at Lewisburg, Pennsylvania. On his release from prison he was awarded compensation of \$180 monthly from Federal Prison Industries, Inc., under 18 U.S.C. § 4126. He later brought this action, which the Government moved to dismiss on the ground that the compensation payments were [fol. 29] his exclusive remedy. The motion to dismiss was denied.¹ The parties later entered into a stipulation in

¹ The motion was for summary judgment but the court below treated it as a motion to dismiss the complaint because no answer

which the Government admitted its negligence, agreed that \$20,000 in addition to the compensation already received and to be paid in the future would adequately compensate the plaintiff for his injuries, and that on the basis of the District Court's decision plaintiff was entitled to a judgment in the amount of \$20,000. The stipulation reserved the Government's right to maintain its defense on appeal and provided that the plaintiff's right to compensation would not be affected by the present action. Pursuant to this stipulation judgment was entered in favor of the plaintiff and against the United States in the amount of \$20,000. From this judgment the Government has appealed.

The question is whether § 4126 of Title 18 is plaintiff's exclusive remedy and bars the present action under the Federal Tort Claims Act.² Section 4126 provides that all moneys under the control of Federal Prison Industries or received from the sale of its products or by-products or for the services of federal prisoners, shall be maintained in a Prison Industries Fund in the Treasury of the United States. The section also provides, in part, that the fund may be employed "in paying, under rules and regulations promulgated by the Attorney General, . . . compensation to inmates or their dependents for injuries suffered in any industry." In 1961 the section was amended by adding a provision for compensation for injuries suffered by inmates "in any work activity in connection with the maintenance or operation of the institution where confined."³ The purpose of the amendment was to eliminate [fol. 30] the discriminatory difference in treatment between prisoners employed in activities of Federal Prison

to the complaint had been filed although the motion was accompanied by affidavits. Cf. Rule 12(b). In view of the subsequent judgment, this procedural detail need not be reviewed.

² The cases are divided. The Government's view prevailed in *Nobles v. Federal Prison Industries, Inc.*, 213 F.Supp. 731 (N.D.Ga. 1963); *Granade v. United States*, 237 F.Supp. 211 (S.D.N.Y. 1965), appeal pending. Plaintiff's view prevailed in *Gomez v. United States*, — F.Supp. — (D.C.Colo. 1965) (34 Law Week 2055 (July 27, 1965)).

³ Act of September 26, 1961, Pub. L. 87-317, 75 Stat. 681, 18 U.S.C. § 4126.

Industries, who were afforded compensation for injuries, and prisoners working in various other institutional and maintenance operations, who were not entitled to compensation.⁴

In *United States v. Muniz*, 374 U.S. 150 (1963), the Supreme Court recently made it clear that claims against the United States for personal injuries sustained by inmates of federal prisons resulting from the negligence of government employees are within the Federal Tort Claims Act. The opinion was written by the Chief Justice for a unanimous Court. Its avowed purpose was to explore fully the intent of Congress in adopting the Federal Tort Claims Act, and it reviewed the effect of compensation benefits on the remedy afforded by the Act. It therefore points the way to our conclusion. The Court, after examining the circumstances surrounding the adoption of the Act, concluded that "it is clear that Congress intended to waive sovereign immunity in cases arising from prisoners' claims." (374 U.S., at 158). The Court rejected the Government's argument that an exception should be implied because of the requirements of prison discipline, and because of *Feres v. United States*, 340 U.S. 135 (1950), which held that the United States was not liable under the Act for injuries sustained by a member of the armed forces in the course of activity incident to his military service. Finding that the ultimate justification for the *Feres* decision was the necessity of maintaining military discipline, the Court declared that there was no such necessity in regard to prisoners, as was shown by the experience of those states which permitted suits by prisoners. But the Court also considered the language of *Feres* dealing with the effect of a compensation plan, saying: "... [T]he presence of a compensation system, persuasive in *Feres*, does not of necessity preclude a suit for negligence. [fol. 31] ... [T]he compensation system in effect for prisoners in 1946 was not comprehensive. It provided compensation only for injuries incurred while engaged in prison industries. Neither Winston nor Muniz [the respondents] would have been covered." (374 U.S., at 160).

⁴ Sen. Rep. No. 1056 (87th Cong. 1st Sess., 1961), reprinted at 2 U. S. Code Congr. and Admin. News, 1961, p. 8028.

In a footnote the Court pointed out that even the broadened compensation coverage of prisoners provided by the amendment of 1961 failed to reach all prisoners, and added: "And, in any event, the compensation system still fails to provide for non-work injuries, contrary to that applicable to military personnel." (374 U.S., at 160, n. 17).

The Supreme Court's careful analysis of the intention of Congress in adopting the Federal Tort Claims Act in 1946 makes it clear that claims by prisoners for negligence fall within the Act and that this coverage is not to be cancelled whenever thereafter some alteration is made in the provision of compensation for prisoners. If such compensation is intended to create either an election of remedies or an obliteration of the remedy for tort, it is to be expected that Congress will express such intention in the compensation statute, especially if it does not establish a full and comprehensive plan.

Congress in adopting the amendment of 1961 to § 4126 gave no express indication that the compensation authorized by it was to be exclusive, and its provisions preclude the imputation of any such intention. The compensation scheme for prisoners is very different from the compensation system for servicemen which was described in *Feres* as being "simple, certain, and uniform" (340 U.S., at 144) at the time the Federal Tort Claims Act was passed in 1946. It is also vastly different from the right to compensation enjoyed by government employees under the Federal Employees Compensation Act. It is permissive rather than mandatory. The amount of the award rests entirely within the discretion of the Attorney General,⁵ but may not under [fol. 32] the statute exceed the amount payable under the Federal Tort Claims Act. Compensation is paid only upon the inmate's release from prison and will be denied if full recovery occurs while he is in custody and no significant disability remains after his release.⁶ There is no provision for the claimant to have a personal physician present at

⁵ See Note, Denial of Prisoners' Claims Under the Federal Tort Claims Act, 63 Yale L. J. 418, 423 (1954).

⁶ Federal Prison Industries, Inc., Inmate Accident Compensation Regulations § 11, 28 C.F.R. §§ 301.1, 301.2.

his physical examination,⁷ and there is no opportunity for administrative review.⁸ Finally, compensation, even when granted, does not become a vested right, but is to be paid only so long as the claimant conducts himself in a lawful manner and may be immediately suspended upon conviction of any crime, or upon incarceration in a penal institution.⁹

What emerges on examination, therefore, is a severely restrictive system of compensation permeated at all levels by the very prison control and dominion which was at the origin of the inmate's injury. This discretionary and sketchy system of compensation, which would not even have covered the present plaintiff in 1946, may not be deemed the equivalent of compensation under the Federal Employees Compensation Act of 1916. Nowhere can there be found any indication that Congress intended that it should serve to exclude prisoners from the broad and sweeping policy embodied in the Federal Tort Claims Act.

The Government, however, argues that the *Muniz* case is not controlling here because the two prisoners involved in that case were not covered by any compensation plan, and that all that was said by the Court therefore was dicta. They urge that applicable here is the principle applied in *Johansen v. United States*, 343 U.S. 427 (1952),¹⁰ [fol. 33] reaffirmed in *Patterson v. United States*, 359 U.S. 495 (1959). In *Johansen* the petitioners were injured in the performance of their duties as seamen. They were concededly within the Federal Employees Compensation Act (5 U.S.C. §§ 751, *et seq.*). They sued, however, to recover damages from the United States under the Public Vessels Act of 1925 (46 U.S.C. §§ 781, *et seq.*). The Court held that although the language of the Public Vessels Act

⁷ Compare Federal Employees Compensation Act, § 21, 5 U.S.C. § 771.

⁸ Compare Federal Employees Compensation Act, § 37, as amended, 5 U.S.C. § 787.

⁹ Federal Prison Industries, Inc., Inmate Accident Compensation Regulations § 16, 28 C.F.R. § 301.5.

¹⁰ Affirming *Johansen v. United States*, 191 F.2d 162 (2 Cir. 1951), and *Mandel v. United States*, 191 F.2d 164 (3 Cir. 1951).

appeared to permit such a suit, its central purpose as ascertained from its legislative history and the circumstances surrounding its enactment, led to the conclusion that Congress did not intend it to confer the right to sue on claimants who were entitled to the benefits of the Federal Employees Compensation Act. Among the reasons for the Court's conclusion was the fact that the Federal Employees Compensation Act covers all government employees, to whom it brought the benefits of the socially desirable rule that society should share with the injured employee the costs of accidents incurred in the course of employment: "All in all we are convinced that the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels. As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." (343 U.S., at 441).¹¹

Thus the essence of *Johansen* is that the Federal Employees Compensation Act is so comprehensive a system of coverage of all government employees that it is presumably intended to be their exclusive remedy.

The difference between the effect of general compensation available to government employees under the Federal Employees Compensation Act and that of compensation plans dealing with special circumstances, on rights under [fol. 34] the Federal Tort Claims Act is illustrated by *United States v. Brown*, 348 U.S. 110 (1954). It was there held that a veteran could maintain an action under the Federal Tort Claims Act for damages for negligent medical treatment in a Veterans Administration hospital aggravating a service-connected injury, even though he had received additional compensation because of the aggravation, since Congress had given no indication that the right of veterans to compensation was an exclusive

¹¹ The 1949 amendment to the Federal Employees Compensation Act, which was passed after the *Johansen* case arose, expressly made the Act exclusive of other remedies against the United States.

remedy. Johansen was distinguished as involving a general workmen's compensation plan.¹²

The limited and discretionary compensation scheme provided by § 4126 is not comparable to the system of compensation provided for government employees by the Federal Employees Compensation Act. Limited as it is in both the scope of its coverage and the relief it extends, it is not such a broad and general system of compensation that it may be deemed impliedly to express a congressional intention to except federal prisoners injured in the course of their work as inmates from the remedial protection afforded by the Federal Tort Claims Act. The Act, as the Supreme Court has said, "provides much-needed relief to those suffering injury from the negligence of government employees. We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress." *United States v. Muniz*, 374 U.S. 150, 165-66 (1963).

The judgment therefore will be affirmed.

* * * *

¹² Similarly, *Brooks v. United States*, 337 U.S. 49 (1949), holding that servicemen who recovered compensation for injuries were not barred from suing under the Federal Tort Claims Act if the injuries were sustained while on furlough. See also Annotation, 84 A.L.R.2d 1059.

[fol. 35] * * *

[fol. 36]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15087

[File Endorsement Omitted]

STEPHEN ROBERT DEMKO

v.

UNITED STATES OF AMERICA, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GANEY and FREEDMAN, *Circuit Judges*, and
KIRKPATRICK, *District Judge*

ORDER AMENDING OPINION—September 29, 1965

It is ORDERED that the opinion filed herein on September 21, 1965 be amended as follows:

The words "Federal Employees Compensation Act" are substituted for "Federal Tort Claims Act", on page 5, lines 1 and 2.

For THE COURT:

ABRAHAM L. FREEDMAN,
Circuit Judge.

[fol. 37]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,087

[File Endorsement Omitted]

STEPHEN ROBERT DEMKO

vs.

UNITED STATES OF AMERICA, APPELLANT
(D.C. Civil No. 63-803)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GANEY and FREEDMAN, *Circuit Judges*, and
KIRKPATRICK, *District Judge*

JUDGMENT—September 21, 1965

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court, filed July 14, 1964, be, and the same is hereby affirmed, with costs.

ATTEST:

/s/ Ida O. Creskoff
Clerk

September 21, 1965

Costs taxed in favor of appellee,
Stephen Robert Demko, as follows:

Brief for appellee \$63.60

Certified as a true copy and issued in lieu of a formal
mandate on October 7, 1965.

Test: /s/ Ida O. Creskoff
Clerk, United States Court of
Appeals for the Third Circuit.

[fol. 38]

[Clerk's Certificate to foregoing transcript
omitted in printing.]

[fol. 39]

SUPREME COURT OF THE UNITED STATES

No., October Term, 1965

UNITED STATES, PETITIONER

vs.

STEPHEN ROBERT DEMKO

**ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—December 14, 1965**

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 18, 1966.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 14th day of December, 1965.

[fol. 40]

SUPREME COURT OF THE UNITED STATES

No. 1039, October Term, 1965

UNITED STATES, PETITIONER

v.

STEPHEN ROBERT DEMKO

ORDER ALLOWING CERTIORARI—April 4, 1966.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.